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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

L.A.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

ORANGE COUNTY SOCIAL SERVICES  
AGENCY et al.,

Real Parties in Interest.

G046688

(Super. Ct. Nos. DP014119,  
DP014120, DP019327, DP019328)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Jane Shade, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition denied.

Frank Ospino, Public Defender, Michael Hill, Assistant Public Defender, Christine Johnson and Dennis M. Nolan, Deputy Public Defenders, for Petitioner.

No appearance for Respondent.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Jeannie Su, Deputy County Counsel, for Real Party in Interest Orange County Social Services Agency.

Law Office of Harold LaFlamme and Yana Kennedy for the Minors.

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Petitioner, the mother, L.A., requests this court issue a peremptory writ of mandate directing the juvenile court to vacate the orders it made on March 20, 2012, remand the matter for a retrial of the combined 6-, 12-, and 18-month review, order Orange County Social Services Agency (SSA) to supplement its reports, reinstate family reunification services and vacate the hearing under section Welfare and Institutions Code 366.26 presently scheduled for July 18, 2012. (All statutory references are to the Welfare and Institutions Code.)

Petitioner's argument that she was denied her due process rights when she was not permitted to cross-examine a social worker who worked on the case at an earlier time, and whose notes and observations were included in the social worker's reports, fails. Her other arguments lack merit as well and her petition is denied.

## I

### FACTS

We filed our nonpublished opinion (*In re J.G.* (June 9, 2011, G044689) in an appeal in this matter wherein we affirmed the juvenile court's dispositional order to the extent the oldest of four children, who was then 11 years old, was placed apart from his three siblings. We stated the following facts in that opinion:

"Mother has four children: son J.G. (born in 1999); son B.A. (born in 2005); daughter J.A. (born in 2007); and son C.A. (born in 2008). The children have

three different fathers, but for purposes of this case we shall refer to J.H. as ‘father’ because he is the presumed father of the two youngest children and is involved in the underlying facts of this dependency action.

“In January 2010, SSA began investigating allegations of physical abuse reported by J.G.’s elementary school. In response to questioning, J.G. claimed father abused him by throwing objects at J.G. (such as shoes and, on one occasion, a bowl of ice cream). J.G. had 19 bruises on his body; J.G. claimed 14 of the bruises were caused by father.

“All four of the children were detained and placed in a foster care facility on January 8, 2010. SSA filed a juvenile dependency petition on January 11, 2010. On January 12, 2010, the court approved of the detention of the children from their parents’ physical custody, and further approved their placement at a suitable facility or with a suitable foster parent.

“On January 21, 2010, J.G. was removed from his initial foster facility placement (separating him from his three siblings). The foster mother ‘requested the child be removed due to the child inflicting injury to his four year old brother . . . causing [his brother] to have a bloody nose, kicking the foster mother; and the foster mother was overwhelmed with the care and attention the child required.’

“In a February 1, 2010 interview, B.A. (then four years old) described various physical abuse suffered by himself and J.G. at the hands of father and mother. B.A. claimed J.G. had threatened to get a knife and kill B.A. B.A. also said children at school hit J.G. and made J.G. mad.

“On February 3, 2010, J.G.’s foster parent reported that J.G. ‘had been suspended from school for one day for kicking the teacher . . . .’ On March 22, 2010, J.G. swung at an Orangewood staff member three times, connecting once. On another occasion at his foster home, J.G. threw a lamp at his foster parent. SSA could not find a foster home willing to accept J.G. due to his behavioral issues.

“A July 8, 2010, psychological evaluation of J.G. included the following assessment: ‘[J.G.]’s impulsivity with respect to outbursts of aggression and anger appear to be due to confusion about how to respond and act appropriately. At the age of 11, [J.G.] has yet to experience a consistent home where he has learned about appropriate responses to adversity.’

“The jurisdictional and dispositional hearing was continued on multiple occasions. The hearing finally proceeded on October 27, 2010. Mother and father stipulated to an amended factual basis for the dependency action, and the court found the children to be dependents under Welfare and Institutions Code section 300, subdivision (b).<sup>1</sup> The court released all of the children to mother’s custody under certain ‘C.R.I.S.P.-like conditions.’<sup>2</sup> Included among the conditions were requirements that father not live with the family and any visits by father had to be monitored.

“The children were detained at Orangewood on November 22, 2010. SSA filed an ex parte application on December 6, 2010, informing the court of an alleged violation of the condition that father not have unmonitored contact with the children. On the positive side, according to his therapist in late December 2010, J.G. was ‘doing so much better since he has been returned to Orangewood . . . . The child . . . has not displayed any behavior problems.’

“Trial began on December 13, 2010 and continued through January 5, 2011, with regard to dispositional issues. The court found by clear and convincing evidence that section 361, subdivision (c)(1),<sup>3</sup> applied as to mother and father. The court

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<sup>1</sup> “All statutory references are to the Welfare and Institutions Code.

<sup>2</sup> “C.R.I.S.P. is an acronym standing for Conditional Release with Intensive Supervision.

<sup>3</sup> “‘There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be

ordered the children removed from the physical custody of parents and ordered SSA to provide reunification services to parents. The court approved the three younger children's placement, and approved of J.G.'s *temporary* placement at Orangewood (but disapproved of Orangewood as a placement beyond the time necessary to find a more appropriate placement). The court found SSA adequately explained why it could not place all four siblings together, despite the importance of maintaining sibling relationships."

Since we filed our last opinion the juvenile court held a combined 6-, 12-, and 18-month trial. Social worker Brenda Dominguez testified on January 23, 2012. She was assigned to the case at the end of October 2011.

Dominguez recommended the court terminate services. She testified she did not feel it would be appropriate to return the children to the mother's care because of "new allegations of physical abuse that were brought to the agency's attention. And the child has reported—the child [B.A.] has reported that he was physically abused by the mother. So there are concerns. And due to the trial visit being failed because of the alleged physical abuse." She added there were also "concerns that the child [J.G.] has been demonstrating behavioral issues for quite some time now, and the mother's belief is that there are no behavioral issues with the children. So that is a concern. [¶] The children do need—specifically, [J.G.] does need services to assist him with physical aggression. If [J.G.] were to return to the mother, her belief there are no behavioral issues would be a concern as to how she would handle things when the child would demonstrate these behaviors."

In December 2011, Dominguez provided the mother with information about where to obtain anger management services. But it was not until the day Dominguez testified that the mother informed her she had enrolled in an anger management program.

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protected without removing the minor from the minor's parent's or guardian's physical custody.' (§ 361, subd. (c)(1).)

Prior to that date, the mother completed parenting education, individual counseling and a personal empowerment program.

The mother's counsel did not cross-examine Dominguez until March 5, 2012, about six weeks after her direct examination. In the interim, three of the four children had visitation with the mother in February. Afterward B.A. made allegations about the mother squeezing him during the visit. Over the course of time, Dominguez has had concerns the children are not well behaved and the mother has difficulties controlling them. On February 15, the foster mother reported J.G. disclosed he had been hit by his stepfather.

With regard to SSA reports written by Dominguez, the mother's counsel unsuccessfully objected at every opportunity to the admission of the reports into evidence absent an opportunity to cross-examine a social worker whose notes Dominguez included in the reports. An investigator from the public defender's office testified she tried to serve the other social worker, Elizabeth Gomez, with a subpoena to appear at trial, but was told Gomez was on leave. Six SSA reports were admitted into evidence. They were dated November 28, 2011, December 13, 2011, December 19, 2011, January 23, 2012, February 6, 2012 and March 5, 12. The four we find in the appellate record were all signed by Dominguez and her supervisor Michael Waterhouse.

When the court ruled at the end of the trial, it made all its findings by clear and convincing evidence. The court found "return of the children would create a substantial risk of detriment to the safety, protection or physical or emotional well being of the children and . . . reasonable services have been provided . . . . [¶] . . . the extent of the progress which has been made toward alleviating or mitigating the causes necessitating placement by the mother have been minimal . . . ." The court further found that placement of the four children together was not appropriate and that SSA made reasonable efforts to maintain J.G.'s relationships with others. The court ordered reunification services terminated and set a hearing under section 366.26.

The reports contain the following notes: “the children continue to be physically aggressive with each other and adults in the home”; B.A. “grabbed his male peer’s private area on a few occasions at school, and continued to push and fight with other students in school”; B.A. yelled to a child at school “I’m going to kill you”; when the social worker observed two one-half inch scratches under both of C.A.’s eyes, the foster mother explained “the children fight with one another constantly”; the foster mother reported that B.A. “picked fights constantly with his siblings and was aggressive toward them and the adults in the home;” and that C.A. behaves “aggressively.” Additionally, at a January 10, 2012 hearing county counsel informed the court that “noting from some of the past 15-day reviews that the youngest children in the past have been reported to bite each other.”

## II

### DISCUSSION

#### *Cross-examination of Gomez*

Petitioner argues “the testifying social worker’s efforts to verify the contents of Gomez’s reports do not excuse the due process violation of precluding testimony from Gomez.” In other words, one social worker, Dominguez, the one who actually wrote the reports, testified. But social worker Elizabeth Gomez’s observations and notes from earlier contacts were included in the reports admitted into evidence. County counsel argues there is no legal requirement that social workers who prepare reports be available for cross-examination.

“It is axiomatic that due process guarantees apply to dependency proceedings. [Citations.] Parties to such proceedings have a due process right to confront and cross-examine witnesses, at least at the jurisdictional phase. [Citations.] The essence of due process is fairness in the procedure employed; a meaningful hearing, one including the right to confront and cross-examine witnesses, is an essential aspect of that procedure. [Citation.] But due process also is a flexible concept, whose application

depends on the circumstances and the balancing of various factors. [Citations.]” (*Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 756-757.)

A decision adversely affecting child custody or parental status does not implicate the same due process rights afforded an indigent defendant in a criminal matter. (*In re Sade C.* (1996) 13 Cal.4th 952, 991-992.) “[A]t trial, criminal defendants have a general right under the Fourteenth Amendment’s due process clause to . . . fully confront and cross-examine witnesses under the Sixth Amendment as made applicable to the states through the Fourteenth Amendment’s due process clause [citation] . . . . Parents are not so benefited.” (*Ibid.*)

In a noncriminal matter, any right of confrontation is brought to bear not by the Sixth Amendment, but by the due process clause of the Fourteenth Amendment. (*People v. Otto* (2001) 26 Cal.4th 200, 214.) A key difference between testimonial hearsay considered under the Sixth Amendment and the same evidence considered under a due process analysis is that while such evidence is inadmissible under the Sixth Amendment in a criminal prosecution regardless of the reliability of the evidence (*Crawford v. Washington* (2004) 541 U.S. 36, 61-64), reliable testimonial hearsay admitted pursuant to the Evidence Code is not categorically inadmissible under due process. (*People v. Angulo* (2005) 129 Cal.App.4th 1349, 1367-1368.)

The California Rules of Court have a rule covering general provisions for all proceedings. Rule 5.534(k)(1)(B) states: “(k) Advisement of hearing rights (§§ 301, 311, 341, 630, 702.5, 827)<sup>4</sup> [¶] (1) The court must advise the child, parent and guardian in section 300 cases, and the child in section 601 or section 602 cases, of the following

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<sup>4</sup> The numbers contained in parenthesis immediately after the title of the subheading (§§ 301, 311, 341, 630, 702.5, 827) appear to refer to various sections of the Welfare and Institutions Code and possibly indicate this subheading is limited to hearings that are instituted under these sections, in which case the advisement need not be given for 6-, 12-, or 18-month hearings pursuant to this rule. But the parties have neither argued nor briefed this issue.

rights: [¶] (B) The right to confront and cross-examine the persons who prepared reports or documents submitted to the court by the petitioner and the witnesses called to testify at the hearing.”

County counsel neither argued nor laid a foundation the reports were official, public or business records, but contended to the juvenile court and to us that “there was no legal requirement that either Dominguez or Gomez be available for cross-examination for the reports to be admitted, as this was not the jurisdictional hearing.” To support its argument county counsel cites *In re Jeanette V.* (1998) 68 Cal.App.4th 811: “The *right* to cross-examination based upon statute and court rule applies only to the *jurisdictional* hearing. [Citations.] ‘Although written reports prepared by a county welfare department are admissible at a jurisdictional hearing only where the preparer of the report is available for cross-examination[,] once jurisdiction over a minor has been established, the admissibility of such reports is no longer conditioned on the availability of the author for cross-examination [citations].’ [Citation.] ‘The statutes clearly indicate legislative intent to treat the two phases of dependency proceedings differently. Under section 355, more stringent evidentiary requirements must be met at the jurisdictional hearing where the court initially intervenes and obtains jurisdiction over the child.’ (*Id.* at p. 816.) Section 355, which refers to the jurisdictional hearing specifically states: “The preparer of the social study shall be made available for cross-examination upon a timely request by any party.” (§ 355, subd. (b)(2).)

*In re Jeanette V.* was criticized in *In re Matthew P.* (1999) 71 Cal.App.4th 841, which was written by another panel of this division: “We are aware of the recently filed opinion from the Second District, *In re Jeanette V.* (1998) 68 Cal.App.4th 811, which holds that parties have a statutory right to cross-examination only at the jurisdictional hearing. This case confuses the right to cross-examination, which applies to all hearings, with the admissibility of the social study reports. At the jurisdictional hearing, the social study reports are admissible *only* if the preparer of the report is

available for cross-examination. At subsequent hearings, the reports are admissible without that condition. [Citation.] The lesser requirement for admissibility of the reports . . . does not compromise a party's right to request the presence of the preparer and cross-examine him or her.” (*Id.* at p. 849, fn. 3.)

The *Matthew P.* court reversed because the juvenile court did not permit cross-examination of the social worker who prepared the reports which were admitted into evidence, stating: “The parties to dependency proceedings have a due process right, confirmed by court rule, to confront and cross-examine witnesses.” (*In re Matthew P.*, *supra*, 71 Cal.App.4th at pp. 845, 849.) However, there was one significant difference in the factual setting in *Matthew P.* from the instant case. Just as in the present case, the social worker who prepared the reports in *Matthew P.* was new to the case, but the juvenile court would not permit cross-examination of him about the reports he prepared. (*Id.* at pp. 845, 847.) Thus, the analogous connection would be there if the juvenile court had not permitted cross-examination of Dominguez, which is not what happened. Dominguez was subjected to lengthy cross-examination.

Petitioner cites *In re Stacy T.* (1997) 52 Cal.App.4th 1415, involving the juvenile court's denial of a parent's request to call the preparers of fact sheets appended to the social worker's report which contained “the crucial facts” leading up to removal. (*Id.* at pp. 1424-1425.) However, since that case concerned a settlement conference that transformed into an unnoticed jurisdictional hearing, it is not helpful to us here.

As seen in *In re Jeanette V.*, *supra*, 68 Cal.App.4th 811, there is *precedent contrary* to the mother's argument she was entitled to cross-examine Gomez. Even without that precedent under the overall circumstances of this case, due process was given to her. She was permitted to cross-examine the social worker assigned to the case, the person who prepared the reports. She made no offer of proof to demonstrate what difference she expected the testimony of Gomez might make. She has not shown in her

petition she was prejudiced by the juvenile court's ruling. For all these reasons, petitioner's argument fails.

### *Separate Foster Homes*

Petitioner next argues: "The juvenile court erred when it determined the social worker's reports established a basis for placing the children in three separate foster homes." County counsel argues there was no error, and points out that "SSA faces competing statutory directives regarding placement of siblings." A juvenile court's placement decision is reviewed for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

"It is the intent of the Legislature to maintain the continuity of the family unit, and ensure the preservation and strengthening of the child's family ties by ensuring that when siblings have been removed from their home, either as a group on one occurrence or individually on separate occurrences, the siblings will be placed in foster care together, unless it has been determined that placement together is contrary to the safety or well-being of any sibling. The Legislature recognizes that in order to ensure the placement of a sibling group in the same foster care placement, placement resources need to be expanded." (§ 16002, subd. (a).)

"It is further the intent of the Legislature to reaffirm its commitment to children who are in out-of-home placement to live in the least restrictive, most familylike setting and to live as close to the child's family as possible . . . ." (§ 16000, subd. (a).)

"The status of every dependent child in foster care shall be reviewed periodically as determined by the court but no less frequently than once every six months, as calculated from the date of the original dispositional hearing, until the hearing described in Section 366.26 is completed. The court shall consider the safety of the child and shall determine all of the following: [¶] . . . [¶] (D)(i) Whether the child has other siblings under the court's jurisdiction, and, if any siblings exist, all of the following: [¶]

(I) The nature of the relationship between the child and his or her siblings. [¶] (II) The appropriateness of developing or maintaining the sibling relationships pursuant to Section 16002. [¶] (III) If the siblings are not placed together in the same home, why the siblings are not placed together and what efforts are being made to place the siblings together, or why those efforts are not appropriate. [¶] (IV) If the siblings are not placed together, the frequency and nature of the visits between siblings. (V) The impact of the sibling relationships on the child's placement and planning for legal permanence. [¶] (VI) The continuing need to suspend sibling interaction, if applicable, pursuant to subdivision (c) of Section 16002. [¶] (ii) The factors the court may consider in making a determination regarding the nature of the child's sibling relationships may include, but are not limited to, whether the siblings were raised together in the same home, whether the siblings have shared significant common experiences or have existing close and strong bonds, whether either sibling expresses a desire to visit or live with his or her sibling, as applicable, and whether ongoing contact is in the child's best emotional interests.” (§ 366, subd. (a)(1)(D)(i), (ii).)

Without addressing SSA's arguments petitioner forfeited this claim by not raising it earlier, this court has no jurisdiction to consider the issue because it should have been raised in an appeal which was time-barred by the time this petition was filed and that this court already ruled on the issue with regard to J.G. in its June 9, 2011 opinion, we can quickly dispense with it. There is substantial evidence in the record before us the children presented a danger to each other and that the juvenile court was concerned about their safety. Under these circumstances, we cannot find the juvenile court abused its discretion.

#### *Alleged Discovery Violation by County Counsel*

The argument in the petition is unclear here. Apparently, petitioner argued to the trial court that no discovery had been received concerning an incident involving an

injury to B.A.'s hurt "hand" when county counsel questioned B.A. about it on February 27, 2012. Later, on March 5, mother's counsel argued county counsel was "not neutral" because county counsel had actually received a report of the incident and had not timely informed mother's counsel about it.

In her petition, mother contends her "due process rights were offended by the re-opening of SSA's case following county counsel's misconduct." But she does not give us enough information to follow her reasoning. Because she has not supported her petition with sufficient argument on this point, we deem it to be waived. (Cal. Rules of Court, rule 8.486(b).)

#### *Section 366.1*

Petitioner's last argument is: "The social worker and the juvenile court failed to identify persons important to [J.G.] as required by statute." County counsel contends Dominguez's reports "discussed individuals who were important to [J.G.], including Mother and his siblings."

"Each supplemental report required to be filed pursuant to Section 366 shall include, but not be limited to, a factual discussion of each of the following subjects: [¶] . . . [¶] (g) Whether a child who is 10 years of age or older and who has been in an out-of-home placement for six months or longer has relationships with individuals other than the child's siblings that are important to the child, consistent with the child's best interests, and actions taken to maintain those relationships. The social worker shall ask every child who is 10 years of age or older and who has been in an out-of-home placement for six months or longer to identify any individuals other than the child's siblings who are important to the child, consistent with the child's best interest. The social worker may ask any other child to provide that information, as appropriate." (§ 366.1, subd. (g).)

Dominguez's reports contain statements about how the children are excited to see the mother, and how well the visits between the mother and J.G., specifically,

went. Court-appointed special advocates' reports state J.G. "has expressed his desire to be reunited with his family" and "[J.G.] and his mother are very close. [J.G.] misses his mother, and they show mutual love and respect for each other."

It is clear from Dominguez's reports that his mother is a very important person to him. We find no error.

### III

#### DISPOSITION

The petition is denied.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.